

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by  
Delores Fridge, Commissioner,  
Department of Human Rights,  
Complainant,

v.

The Board of Trustees of the  
Parish of St. Pius X,  
The Board of Trustees of the  
Parish of St. Mary of the Lake and  
Holy Family Middle School,  
Respondents.

**ORDER ON MOTION  
FOR SUMMARY DISPOSITION**

The above-entitled matter is before the undersigned Administrative Law Judge on Complainant's motion for summary disposition. Complainant filed its motion on June 4, 1998. Respondents filed a memorandum in opposition to the motion on June 29, 1998. The record closed on July 8, 1998, upon receipt of Complainant's response memorandum.

Erica Jacobson, Assistant Attorney General, 1200 NCL Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2130 appeared on behalf of the Complainant. Robert M. Frisbee, Attorney at Law, 4005 West 65<sup>th</sup> Street, Suite 200, Edina, Minnesota 55435, appeared on behalf of Respondents.

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**ORDER**

IT IS HEREBY ORDERED that:

1. Complainant's motion for summary disposition is GRANTED. Respondents committed an unfair discriminatory practice by denying Katrina Kaiser the opportunity to play on Holy Family Middle School's 1997 baseball team because of her sex.
2. Respondents shall stop restricting membership on athletic teams at Holy Family Middle School to boys, with the exception of wrestling. Any wrestling team may be restricted to boys pursuant to Minn. Stat. § 126.21, subd. 3(5) (1998).
3. Respondents shall notify students at Holy Family Middle School that, in the future, (1) girls will be permitted and welcome to participate on all athletic teams at Holy Family Middle School except wrestling, (2) girls who wish to

participate on a team that is open to both boys and girls will be given the same opportunity to participate on the team as boys are given.

4. Respondents shall pay a civil penalty in the amount of \$10,000 to the State of Minnesota by mailing a check payable to the General Fund of the State of Minnesota to the Commissioner of Human Rights.
5. Pursuant to Minn. Stat. § 363.071, subd. 7, Respondents shall reimburse the Department of Human Rights for the costs of services rendered by the Administrative Law Judge.
6. Within 30 days of the date of this Order, the Complainant shall file with the Administrative Law Judge and serve upon Respondents a petition for reimbursement for attorney's fees incurred in this matter. Respondents shall file their response to the petition with the Administrative Law Judge and serve the response on Complainant within 20 days of receipt of the petition. The ALJ shall issue a further order setting the final amount of fees to be paid by Respondents.

Dated this 7th day of August 1998.

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STEVE M. MIHALCHICK  
Administrative Law Judge

### **NOTICE**

Pursuant to Minn. Stat. § 363.071, subd. 1, this Order is the final decision in this case. Under Minn. Stat. § 363.072, the Commissioner of Human Rights or any person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 to 14.69.

### **MEMORANDUM**

Holy Family Middle School is a private educational institution located in White Bear Lake, Minnesota. The school began operation in 1994 and is governed by the Board of Trustees of the Parish of St. Pius X and the Board of Trustees of the Parish of St. Mary of the Lake. In February of 1997, Holy Family Middle School sent a letter to parents inviting students to sign up for its baseball and softball teams. The letter stated that there would be no try outs, and that girls would play only on girls' teams and boys would play only on boys' teams. The school offered its students "boys baseball", "girls slow-pitch softball", and "girls fast-pitch softball".<sup>[1]</sup>

During the 1996-1997 school year, Katrina Kaiser (hereinafter "Katrina") was a student in the 8<sup>th</sup> grade at Holy Family Middle School. Katrina wanted to play baseball. Because Holy Family Middle School did not offer a girls' baseball team, Katrina requested to play on the boys' baseball team.<sup>[2]</sup> Molly Whinnery, principal of Holy Family Middle School, wrote Katrina a letter denying her request to play baseball. In the

letter, Whinnery stated: "All the female students at Holy Family have the opportunity to play slow-pitch or fast-pitch softball this spring. Whether or not the female students like those sports or want to play those sports is not at issue . . . Your choices for spring sports at Holy Family are fast-pitch or slow-pitch softball."<sup>[3]</sup> There were no try-outs for Holy Family Middle School's 1997 8<sup>th</sup> grade baseball team. Katrina was not permitted to play on the school's baseball team because she is a girl and membership on the team was restricted to boys. Holy Family Middle School does not dispute that Katrina was excluded from the school's 1997 baseball team because of her sex.<sup>[4]</sup>

In April of 1997, Katrina's mother filed a charge of discrimination with the Department of Human Rights. The Department conducted an investigation and, on February 10, 1998, made a finding of probable cause to believe that Respondents committed an unfair discriminatory practice. This contested case was commenced by the issuance of a Notice of and Order for Hearing issued March 31, 1998. Complainant has now moved for summary disposition. The Department argues that Holy Family Middle School's restriction of its baseball, basketball and soccer teams to boys violates the Minnesota Human Rights Act. Respondents contend that their sex restricted baseball team does not violate Minn. Stat. § 363.03, subd. 5 because boys are the sex whose athletic opportunities have been limited at Holy Family Middle School while girls have been afforded superior athletic opportunities.

Summary disposition is the administrative equivalent of summary judgment. Summary disposition is appropriate where there is no genuine issue as to any material fact and one party is entitled to judgment as a matter of law. **Sauter v. Sauter**, 70 N.W.2d 351, 353 (Minn. 1955); **Louwgie v. Witco Chemical Corp.**, 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. 1400.5500K; Minn. R. Civ. P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in the courts in considering motions for summary disposition regarding contested case matters. See, Minn. R. 1400.6600 (1998). A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. **Illinois Farmers Insurance Co. v. Tapemark Co.**, 273 N.W.2d 630, 634 (Minn. 1978); **Highland Chateau v. Minnesota Department of Public Welfare**, 356 N.W.2d 804, 808 (Minn. App. 1984).

The moving party, in this case the Complainant, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary judgment, the nonmoving party must show that there are specific facts in dispute which have a bearing on the outcome of the case. **Thiele v. Stitch**, 425 N.W.2d 580, 583 (Minn. 1988); **Hunt v. IBM Mid America Employees Federal**, 384 N.W.2d 853, 855 (Minn. 1986). The nonmoving party must establish the existence of a genuine issue of material fact by substantial evidence; general averments are not sufficient to meet the nonmoving party's burden under Minn. R. Civ. P. 56.05. **Id.**; **Murphy v. Country House, Inc.**, 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (Minn. 1976); **Carlisle v. City of Minneapolis**, 437 N.W.2d 712, 75 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. **Carlisle**, 437 N.W.2d at 715 (citing, **Celotex Corp. v. Catrett**, 477 U.S. 317, 324 (1986)).

When considering a motion for summary judgment, the facts must be reviewed in the light most favorable to the non-moving party. **Ostendorf v. Kenyon**, 347 N.W.2d 834 (Minn. Ct. App. 1984). All doubts and factual inferences must be resolved against the moving party. See, e.g., **Celotex**, 477 U.S. at 325; **Thiele v. Stich**, 425 N.W.2d 580, 583 (Minn. 1988); **Greaton v. Enich**, 185 N.W.2d 876, 878 (Minn. 1971); **Thompson v. Campbell**, 845 F. Supp. 665, 672 (D. Minn. 1994). If reasonable minds could differ as to the import of the evidence, judgment as a matter of law should not be granted. **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 250-51 (1986).

Minn. Stat. § 363.03, subd. 5 (1996) provides, in relevant part:

It is an unfair discriminatory practice:

- (1) To discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of . . . sex. . . .

The term “educational institution” is defined in Minn. Stat. § 363.01, subd. 15 (1996) to mean a “public or private” school. The word “discriminate” is defined in Minn. Stat. § 363.01, subd. 14 (1996) to include “segregate or separate”. Consequently, the Minnesota Human Rights Act prohibits schools from segregating its services on the basis of sex. The Act, however, contains an exception for school athletic teams. Minn. Stat. § 363.02, subd. 3(b) (1996) provides:

Notwithstanding any other provisions of this chapter or any law to the contrary, it is not an unfair discriminatory practice for an educational institution or a public service to operate or sponsor separate athletic teams and activities for members of each sex or to restrict membership on an athletic team to participants of one sex if this separation or restriction meets the requirements of section 126.21.

Minn. Stat. § 126.21, subd. 2 requires that a school provide equal opportunity for member of both sexes to participate in its athletic program. And Minn. Stat. § 126.21, subd. 3(1) (1996) states:

Notwithstanding any other state law to the contrary, in athletic programs operated by educational institutions or public services and designed for participants 12 years old or older or in the 7<sup>th</sup> grade or above, it is not an unfair discriminatory practice to restrict membership on an athletic team to participants of one sex whose overall athletic opportunities have previously been limited.

Based on these statutes, it is an unfair discriminatory practice for schools to restrict membership on athletic teams to a single sex, unless the sex is the one whose “overall athletic opportunities have previously been limited.” Holy Family Middle School has restricted its baseball team to boys. Consequently, for Holy Family Middle School not to be in violation of Minn. Stat. § 363.03, subd. 5, it must be established that boys are the sex whose overall athletic opportunities have previously been limited.

Complainant maintains that it was the intent of the Legislature for the phrase “one sex whose overall athletic opportunities have previously been limited” to refer to girls, not boys. In support of its position Complainant has submitted excerpts of the

taped legislative discussions regarding the original bill which reveal that the bill's authors intended this phrase to refer to girls. (Kershasky Affidavit, pp. 2-5). Complainant also argues that when determining whether athletic opportunities have been limited for one sex, the focus should not be on a particular sport or school. Rather, according to Complainant, it was the intention of the legislature that a determination regarding limited athletic opportunities be based on an overall state-wide review. (Kershasky Affidavit, pp. 3-5).

Respondents argue that the plain wording of Section 126.21 is not gender specific and that it is inappropriate to read the phrase as being limited to girls. Moreover, Respondents contend that the overall athletic opportunities for girls at Holy Family Middle School have not been limited. According to Respondents, "if any sex should be getting an affirmative action boost, boys should." (Respondents' Memo at 9). Respondents maintain that a comparison of Holy Family Middle School's four year history reveals that girls had 7 athletic teams and boys had 6 for two years; girls had 6 teams and boys had 5 in one year; and both boys and girls had 6 teams in another year. *Id.* Holy Family Middle School offers soccer, baseball, and basketball for boys and soccer, volleyball, basketball, and slow and fast pitch softball for girls. The school also offers a combined track program. (Respondents' Answer at 7). Girls are generally offered two more teams than boys – volleyball in the fall and slowpitch and fastpitch softball rather than baseball. (Respondents Memo at 2). Based on these statistics, Respondent contends that it is boys whose overall athletic opportunities have been limited at Holy Family Middle School, while girls have had an equal or superior opportunity to participate in the school's athletic program.

In addition, Respondents point out that even the legislators who supported the bill acknowledged that once girls' athletic opportunities equaled that of boys', there would no longer be a need for this provision. (Kershasky Affidavit at 6). Respondents argue that since girls at Holy Family Middle School have equal or greater athletic opportunities than boys and since girls' participation in sports nationally has increased dramatically over the last twenty years, there is no longer a need for the remedial measure provided by section 126.21. Moreover, Respondents contend that it is inappropriate to conclude that girls are the sex "whose overall athletic opportunities have previously been limited" based on statistical data regarding girls' participation in sports that is now eighteen to twenty years old.

Interpretation of statutes is a question of law. **McClain v. Begley**, 465 N.W.2d 680 (Minn. 1991). The fundamental rule of statutory construction is that the court should look first to the specific statutory language and be guided by its natural and most obvious meaning. **Heaslip v. Freeman**, 511 N.W.2d 21, 22 (Minn. App. 1994), *rev. denied* (Minn. February 24, 1994); *citing*, **Nadeau v. Austin Mut. Ins.**, 350 N.W.2d 368, 373 (Minn. 1984). When the language of a statute is unambiguous, the court must apply its plain meaning. **Current Technology Concepts, Inc. v. Irie Enterprises, Inc.**, 530 N.W.2d 539 (Minn. 1995); *see also*, Minn. Stat. § 645.16 (1994) (when words of a statute are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.) This principle of plain meaning has its corollary that ordinary rules of grammar apply. **Mattson v. Flynn**, 216 Minn. 354, 359, 13 N.W.2d 11, 14 (1944).

When the wording of a statute is not explicit, courts may consider various factors to construe the intent of the legislature. Minn. Stat. § 645.16 (1998). These factors include: the purpose of the law, the circumstances under which it was enacted and the problem it was seeking to remedy, the contemporaneous legislative history, the former law, the consequences of a particular interpretation, and administrative interpretations of the statute. *Id.*; *In re Indep. Spent Fuel Storage Installation*, 501 N.W.2d 638, 645 (Minn. Ct. App. 1993), *rev. denied* (Minn. July 15, 1993). Tape recordings of committee meetings and floor debates may be considered as a factor in determining the intent of the legislature. *First Nat. Bank of Deerwood v. Gregg*, 556 N.W.2d 214, 217 (Minn. 1996); *Handle With Care, Inc. v. Department of Human Services*, 406 N.W.2d 518, 522 (Minn. 1987). The object of statutory construction “is to ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (1996).

The phrase “one sex whose overall athletic opportunities have previously been limited” in Minn. Stat. § 126.21 is ambiguous. Therefore, the ALJ looks to the purpose of the law and the legislative intent behind it for guidance. The purpose of Minn. Stat. § 126.21, subd. 1 is “to provide an equal opportunity for members of both sexes to participate in athletic programs.” Minn. Stat. § 126.21, subd. 1 (1998). This statement of purpose in subdivision 1 follows an acknowledgement that the “legislature recognizes certain past inequities in access to athletic programs and in the various degrees of athletic opportunities previously afforded members of each sex.” *Id.* The current version of section 126.21, subd. 3(1) and (4) was enacted in 1980. Laws 1980, ch. 355, sec. 1. At the time the current statute was enacted, girls lacked athletic opportunities that were available to boys and girls participated in athletics at a lower rate than boys did<sup>5</sup>. To address this imbalance, the legislators discussed the need to allow girls to participate on boys’ athletic teams and to allow girls-only athletic teams. (Kershasky Affidavit pp. 2-6). In floor debates, legislators specifically interpreted the phrase “a sex whose athletic opportunities have previously been limited” to mean girls. (Kershasky Affidavit pp. 2-3, 6). In addition to the legislative history, both the Minnesota Department of Children, Families & Learning and the Minnesota State High School League interpret Minn. Stat. § 126.21, subd. 3(1) and (4) (1996) to permit schools to have athletic teams restricted to girls and to bar, with the exception of wrestling, the creation of teams restricted to boys. (Dildine Affidavit at ¶¶ 7 & 8). Based on consideration of each of the factors listed above, as well as the record of the legislative discussions, the ALJ concludes that the legislative intent was for the phrase “whose athletic opportunities have previously been limited” in Minn. Stat. § 126.21 to refer to girls.

In addition, in *Striebel v. Minnesota State High School League*, 321 N.W.2d 400, 402 (Minn. 1982), the Minnesota Supreme Court interpreted the phrase “whose overall athletic opportunities have previously been limited” to “generally mean that there will be one team restricted to girls only; the other team is open to members of both sexes.” At issue in *Striebel* was the constitutionality of authorizing separate seasons of play for high school athletic teams segregated substantially according to sex. Although in interpreting the phrase the court was discussing subdivision 3(4) rather than subdivision 3(1), the relevant language (“whose overall athletic opportunities have previously been limited”) is the same in both provisions. *Id.* Contrary to *Striebel*, some courts have interpreted similar language under Title IX regarding “prior limited

opportunities” to be sport-specific and to not necessarily refer to girls, e.g., **Gomes v. Rhode Island Interscholastic League**, 469 F.Supp. 659, 664 (D.R.I. 1978), *vacated as moot*, 604 F.2d 733 (1<sup>st</sup> Cir. 1979). A greater number, however, have rejected this sport-specific interpretation and have looked instead to overall athletic opportunities. See, **Williams v. School District of Bethlehem, PA**, 998 F.2d 168, 174-75 (3<sup>rd</sup> Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994); **Mularadelis v. Haldane Central School Board**, 74 A.D.2d 248, 427 N.Y.S.2d 458, 461-64 (1980).

Moreover, in considering similar language in the regulations promulgated under the authority of Title IX of the Education Amendments Act of 1972, courts have specifically interpreted the phrase regarding the sex whose “athletic opportunities have previously been limited” to refer to girls or women. 20 U.S.C. §§ 1681, 1687; 34 C.F.R. § 106.41(b). In **Cohen v. Brown University**, 101 F.3d 155 (1<sup>st</sup> Cir. 1996), *cert. denied*, 117 S.Ct. 1469 (1997), the court stated “it is women and not men who have historically and who continue to be underrepresented in sports.” Likewise, in **Williams**, 998 F.2d at 175 (3<sup>rd</sup> Cir. 1993), the court observed that, although Title IX and its regulations apply equally to boys and girls, “it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys’ athletic programs to the exclusion of girls’ athletic programs in high schools as well as colleges.”

Based on the legislative history and **Striebel**, the ALJ concludes that the phrase “whose overall athletic opportunities have previously been limited” in Minn. Stat. § 126.21 refers to girls. By restricting athletic teams at Holy Family Middle School to boys, Respondents violated Minn. Stat. § 363.03, subd. 5 (1996). Respondents have argued that such an interpretation of Minn. Stat. § 126.21 violates equal protection and is unconstitutional. The Administrative Law Judge lacks jurisdiction to declare a statute unconstitutional. See, **Neeland v. Clearwater Memorial Hospital**, 257 N.W.2d 366, 369 (Minn.1977); **In re Rochester Ambulance Service, a Div. Of Hiawatha Aviation of Rochester**, 500 N.W.2d 495, 499-500 (Minn. Ct. App. 1993); **Holt v. State Bd. of Medical Examiners**, 431 N.W.2d 905, 906 (Minn. Ct. App. 1988), *rev. denied*, (Minn. Jan. 13, 1989). But like courts, Administrative Law Judges and agencies must, if possible, interpret and apply statutes and rules in a manner that does not violate our Constitutions. See, **State v. Crims**, 540 N.W.2d 860, 867 (Minn. App. 1995).

Even if the statute were to be interpreted as applying to either gender depending on the history of athletic opportunities provided at a particular school, Respondents have failed to establish that boys at Holy Family Middle School are the sex whose overall athletic opportunities have previously been limited. According to Respondents’ statistics, boys at Holy Family Middle School have been offered on average two less sports to participate in than girls (volleyball and softball). Respondents, however, have stated that the athletic program is developed based on student interest indicated on sign-up sheets and general survey forms.<sup>[6]</sup> Respondents admit that no male student at Holy Family Middle School has ever expressed an interest in participating in any sport offered at Holy Family Middle School and been denied the opportunity to participate in that sport.<sup>[7]</sup> It is not enough to show that girls at Holy Family Middle School actually participated in sports in equal or greater numbers than boys. In order for Respondents’ single-sex baseball team to be in compliance with the Minnesota Human Rights Act, Respondents must show that boys’ athletic opportunities were limited. Respondents

have failed to establish that the athletic opportunities for boys at Holy Family Middle School have been limited in any meaningful way. Based on the record submitted, the ALJ concludes that the overall athletic opportunities for boys at Holy Family Middle School have not been limited. Having concluded that boys are not the sex “whose overall athletic opportunities have been limited”, no further inquiry is necessary.

Respondents characterized Katrina’s desire to play baseball as a “one-time whim”, predicted that no woman will ever play in the N.B.A., and pointed out that Ila Borders did not record a win or a save in the Northern League in 1997<sup>[8]</sup>. None of this information or argument is relevant to the issues in this proceeding. It is not the goal of school athletic programs to groom students to be professional athletes. Rather, the value of participating in school sports comes from competing with other students, learning teamwork, and developing physical strength and skills. Even if all of Respondent’s statements are true, the fact remains that Respondents’ refusal to allow Katrina Kaiser to play on Holy Family Middle School’s 1997 baseball team because of her sex was discriminatory.

Finally, Respondents have raised concerns regarding the continued need for the remedial measure of Minn. Stat. § 126.21, subd. 3, given the gains made by girls in athletic opportunities and participation over the last twenty years. These concerns are more appropriately addressed to the Legislature.

There being no genuine issues of material fact, Complainant is entitled to summary disposition as a matter of law.

S.M.M.

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<sup>[1]</sup> Complaint ¶ 7; admitted in Answer.

<sup>[2]</sup> Ex. C attached to Complainant’s Request for Admissions and Interrogatories

<sup>[3]</sup> Complaint ¶ 9; admitted in Answer; attached to Respondents’ Response to Complainant’s Interrogatories; Emphasis in original.

<sup>[4]</sup> Respondents’ Response to Request for Admissions and Interrogatories, Admission No. 25.

<sup>[5]</sup> See, Dildine Affidavit, Ex. B; Kahn Affidavit, Exs. B, D and F; “Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrines,” 66 Minn.L.Rev. 1115 (1982).

<sup>[6]</sup> Respondents’ Response to Interrogatories Nos. 3 and 8.

<sup>[7]</sup> Response dated April 29, 1998 to Request for Admission No. 34.

<sup>[8]</sup> On Friday, July 24, 1998, Ila Borders became the first woman pitcher to win a men’s professional minor league baseball game.